IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 09/02/2004.

Coram:

The Honourable Mr. B. SUBHASHAN REDDY, Chief Justice

and

The Honourable Mr. Justice F.M. IBRAHIM KALIFULLA

W.P. No.4081 of 2002 and W.P.M.P. No.5732 of 2002

Dr. Subramanian Swamy Petitioner

Vs.

1. T.T.V. Dinakaran
Member of Parliament,
Periyakulam, Theni Dist.

2. The Election Commission of India,
Nirvachan Sadan,
Ashoka Road,
NEW DELHI 110 001.

3. Secretary General
Lok Sabha Secretariat,
NEW DELHI 110 001. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Declaration for the reasons stated therein.

For Petitioner : Dr. Subramanian Swamy
Party in Person

For 1st Respondent : Mr. B. Kumar, Sr. Counsel,
for Mr. A. Jinasenan

For 2nd Respondent : Mr. G. Rajagopalan,
Sr. Counsel
For 3rd Respondent Mr. J. Madanagopal Rao,
S.C.G.S.C.

:O R D E R
THE HONOURABLE THE CHIEF JUSTICE

This writ petition has been originally filed seeking a writ of quo warranto to declare that the 1st respondent i.e, Mr.T.T.V.Dinakaran as being disqualified to be a member of the Lok Sabha representing 75 Periyakulam Constituency in Theni District of State of Tamil Nadu, and consequently, for a direction to the Election Commission of India to declare that the above Lok Sabha seat as vacant. During the course of argument when it was pointed out that the writ of quo warranto does not lie and the writ petition is liable to be dismissed on that ground, Dr.Subramanian Swamy has sought to amend the prayer in the writ petition seeking a mandamus to declare the election of the 1st respondent as null and void, and on allowing the said plea of amendment, again arguments were heard.

2. The first respondent is Mr. T.T.V. Dinakaran, who has been elected as a Member of Parliament from Periyakulam Constituency in the Lok Sabha elections during the year 1999. The second respondent is the Election Commission of India and the third respondent is the Secretary General of Lok Sabha. The last date for filing nomination was 24.8.1999 and the election was held on 11.9.1999.

3. The case of the petitioner, who is a renowned politician and statesman Dr. Subramanian Swamy, is that the first respondent was not a Resident of India and had declared his status as Non-Resident Indian staying in Singapore and as such, he was ineligible to contest the election. He has appeared as a party-in-person and made elaborate submissions that the first respondent has got business interests in Singapore, that he is a Director of some companies and holds a Non-Resident Indian status in Singapore and that a Non-Resident Indian cannot contest election, as the prerequisite for being a voter and a contestant is the residence in India and not outside the country. Dr. Subramanian Swamy invokes the provision contained in Article 102 (1) (d) of the Constitution for disqualifying the first respondent from continuing him further as a Member of Lok Sabha. The above Article reads,

"A person shall be disqualified for being chosen as and for being a Member of either Houses of Parliament if he is not a citizen of India or has voluntarily acquired the citizenship of a foreign state or is under any acknowledgement of allegiance or adherence to a foreign state."

He also refers to Sections 16 and 19 of the Representation of People Act, 1950 as also the Handbook for Chief Electoral Officers and page 273 of the book 'How India Votes – Election Laws, Practice and Procedure (First Edition)' by V.S. Rama Devi and S.K. Mendiratta. Section 16 (1) (a) of the Representation

of People Act deals with disqualification for registration in electoral rolls and reads,

'A person shall be disqualified for registration in electoral roll if he is not a citizen of India□□□□."

Section 19 prescribes conditions of registration and one of the said conditions being that a person should ordinarily be a resident in a constituency. Section 20 (1) of the Act says that a person cannot be called an ordinary resident of a place merely because he owns or is in possession of a dwelling house in a constituency. Paragraph 5.1 of the Handbook also explains that the persons, who have gone out of the country for business or employment, should be treated as having moved out of that place and mere ownership or possession of a building or other immoveable property will not bestow on the owner, the residential qualification. Page 273 of the book 'How India Votes □ Election Laws, Practice and Procedure (First Edition)' also mentions,

"It deserves to be specially noted that only those Indian citizens living abroad are eligible to be enrolled as electors in India who are employed under the Government of India for they are required to live abroad in public interest. Other Indian citizens, who are living abroad on their own volition in their own private interest are not eligible to be enrolled as electors in India as, 'ordinary residence' in the Constituency is a condition precedent for registration as an elector of such constituency. They are, however, entitled to have their names registered electors once they come back and resume their ordinary residence in the country."

Dr. Subramanian Swamy has also relied upon the legal propositions laid down by the Supreme Court in HARI PRASAD MULSHANKER TRIVEDI v. V.B. RAJU (1974) (3) S.C.C. 415) and K. VENKATACHALAM v. A. SWAMICKAN (AIR 1999 SC 1723).

4. The first respondent has filed a counter questioning the locus standi of the petitioner on the ground that his election was already contested by one Mr. P. Selvendran, who had contested on behalf of the D.M.K. party, that the same objection was raised to his nomination and that objection was overruled permitting the first respondent to contest the election, that he has won the election and against the declaration of his election, Election Petition No.1 of 2000 has been filed and that the same has been dismissed, that the said dismissal had become final and that this writ petition is not maintainable. On factual side, the allegations are denied stating that he is not a Non-Resident Indian and that he had been residing in India and that what was material was the residence at the time of filing nomination and that even assuming that he was

in any way connected with any business in Singapore during the years 1995 – 96, there is no material to show that he has ever been out of India from 1995 till this date and that his Indian passport has been impounded restricting his movements and that his being a voter raised a presumption that he is a citizen and resident and so long as his name continues in the voter's list, he is deemed to be a citizen and resident and cannot be disqualified on mere assumptions.

5. Mr. B. Kumar, learned senior counsel, appearing for the first respondent, reiterates the same and makes legal submissions that the first respondent was in Singapore for a brief spell and came to India in March 1995 and did not stir out of India. He also refers to the finding given by a Division Bench of this Court in MRS. ANURADHA v. THE JOINT SECRETARY TO THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE AND ANOTHER (H.C.P. No.240 of 1996, dated 27.08.1996). He also relies upon the judgment of the Constitutional Bench of the Supreme Court in HARI PRASAD's case (supra) laying down the proposition that the High Court cannot sit as an Election Court and that only an Election Court can examine with regard to the qualification of a person whether as a voter or a contestant. He has also submitted that the petitioner had also approached the President of India, who has rejected his contention after duly consulting the Election Commission, i.e. the second respondent and that there is absolutely no merit in the legal contentions apart from the fact that the writ petition is not maintainable on the ground of locus standi. He submits that the ratio laid down in VENKATACHALAM's case (supra) by the Supreme Court is not applicable as the facts are different. He also relies upon the ruling of the Supreme Court in P.R. BELAGALI v. B.D. JATTI (AIR 1971 S.C. 1348) and HARI SHANKER JAIN v. SONIA GANDHI (JT 2001 (7) SC 289).

6. In his reply argument, Dr. Subramanian Swamy reiterates his arguments that impounding passport is no ground to plead ordinary residence in India and the stress is on the permanent residence in India and not the temporary restrictions because of the impounding of the passport, that the first respondent, having been permanently residing in Singapore, cannot be called as an ordinary resident in India, that the order by the President, the judgment in H.C.P. or Election Petition, cannot have any relevance to this writ petition as this writ petition is filed invoking the extraordinary powers of this Court as the first respondent has played fraud and misrepresentation and that the proposition laid down by the Supreme Court in VENKATACHALAM's case (supra) holds on all fours in this case and that the writ petition is to be allowed in terms prayed for.

7. (i) In P.R. BELAGALI v. B.D. JATTI (supra), it

was held by a Three-Judge Bench that Section 100 (d) (iv) does not entitle the Court in an election petition to set aside any election on the ground of non- compliance with the provisions of the Act of 1950 or any Rules made thereunder with the exception of Section 16 thereof and that in an election petition the correctness of the electoral roll cannot be gone into. It was held that the entire scheme of the Act of 1950 and the amplitude of its provisions show that the entries to an electoral roll of a constituency can only be challenged in accordance with the machinery provided by it and not in any other manner or before any other forum unless the question of violation of the provisions of the Constitution is involved. It was further held that the question whether the returned candidate was ordinarily a resident in a Constituency under Section 19 (b) of the Act of 1950 during the material period and was entitled to be registered in the electoral roll, could not be the subject matter of enquiry except in accordance with the provisions of the Act, 1950. The said proposition was accepted by a 5 Judge Bench of the Supreme Court in HARI PRASAD's case (supra).

(ii) The same was reiterated by another three Judge Bench of the Supreme Court in SHYAMDEO PD. SINGH v. NAWAL KISHORE YADAV (2000 (8) S.C.C. 46). It was held in the above case of Shyamdeo Prasad that inclusion of person or persons in the electoral roll by an Authority empowered under law to prepare the electoral rolls, though they were not qualified to be so enrolled, could not be made a ground to set aside the election of a returned candidate under sub-clause (iii) or (iv) of clause (d) of sub-Section (1) of Section 100 of the Representation of People Act, 1951 and that a person enrolled in the electoral list by an Authority empowered by law to prepare an electoral roll or to include a name therein, is entitled to cast a vote unless disqualified under sub-sections (2) to (5) of Section 62 of the Representation of People Act of 1951 and a person enrolled in the electoral roll cannot be excluded from exercising his right to cast vote on the ground that he did not satisfy the eligibility requirement as laid down in Sections 19 or 27(5) of Representation of People Act, 1950.

(iii) IN A. SWAMICKAN v. K. VENKATACHALAM (AIR 1987 Madras 60), a question arose as to whether the writ petition is maintainable to disqualify an elected member of a Legislative Assembly without filing an Election Petition. It was held by the Division Bench of this Court that ordinarily an Election Petition is the only recourse for setting aside the election but in an extraordinary situation like the one in which there was an impersonation, the High Court will be failing in its duty in not exercising jurisdiction if the Constitutional disability is brought to its notice. In the said case, K. Venkatachalam was not a voter but another person with the same name Venkatachalam was the voter and impersonating the other Venkatachalam, this Venkatachalam has filed his nomination and it was accepted. Later on, it was brought out very clearly that the candidate

Venkatachalam had impersonated the other Venkatachalam by taking undue advantage of the similarity in name and in those circumstances, the constitutional provisions were invoked and he was disqualified to continue as a Member of the Legislative Assembly and the said decision was affirmed by the Supreme Court in K. VENKATACHALAM v. A. SWAMICKAN (supra). It was held by the Supreme Court that where the appellant (K.Venkatachalam) was not in the electoral roll for Assembly Constituency for General Election and he filed his nomination impersonating himself for another person of the same name in the electoral roll, he lacked the basic qualification under clause (c) of Article 173 of the Constitution read with Section 5 of the Act which mandated that a person to be elected from an Assembly Constituency has to be an elector of that Constituency. It was held that bar under Article 329 (b) will not come into play when the case falls under Articles 191 and 193 and whole of the election process is over, and that Article 226 of the Constitution is couched in widest possible terms and unless there is clear bar to jurisdiction of the High Court, its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of Constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief.

(iv) The Full Bench of this Court in HAJA SHAREEF K.S. v. HIS EXCELLENCY THE GOVERNOR OF TAMIL NADU (1984 WLR Supp. 96) has got no application here as in that case it was held that a Member of the Legislative Assembly, who has been appointed Honorary Consul of a foreign country, incurs disqualification under Article 191 (1) (d) of the Constitution of India.

8. The facts of the present case attract the legal principles enunciated by the Supreme Court in BELAGALI's Case (Supra), which was approved by a Larger Bench in HARI PRASAD's Case (Supra), and again reiterated in the latest judgment in HARISHANKAR's Case (Supra). The judgments in either K.VENKATACHALAM's Case (Supra) or HAJA SHAREEF's Case (Supra) have got no bearing on the facts of the present case.

9. In view of the discussion of the judicial precedents referred to supra, the legal proposition which emerges is that once a person is shown as voter in the electoral roll it raises a statutory presumption that he is entitled to both contest and vote and the said rights cannot be curtailed by any other process otherwise than resorting to Section 22 of the Representation of the People Act, 1950. The undisputed fact is that as on date, the 1st respondent is an elector and his name finds place in the electoral roll. In the result, this writ petition is dismissed. No costs. Consequently, connected W.P.M.P. is also dismissed.

(B.S.R., C.J.) (F.M.I.K., J.)

09.02..2004.
Internet: Yes/No
bh/sm
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